



STATEMENT OF CONSIDERATION
Relating to 103 KAR 8:010
(Not Amended After Comments)

- I. A public hearing on 103 KAR 8:010, scheduled for July 28, 2011 at 10:00 a.m. in Room 386 of the Capitol Annex was held and written comments were also received during the public comment period.
- II. The following people attended the hearing and/or submitted written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Mr. Mark Sommer, Attorney	Greenebaum, Doll & McDonald, PLLC
Ms. Ann-Marie Hallett, Senior Tax Paralegal	Greenebaum, Doll & McDonald, PLLC

- III. The following people from the promulgating administrative body attended and/or responded to the written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Travis Powell, Deputy General Counsel	Office of General Counsel
Devon Hankins, Policy Advisor	Office of General Counsel
Doug Hendrix, Staff Attorney	Office of Legal Services, Dept. of Revenue

IV. SUMMARY OF COMMENTS AND RESPONSES

The Finance and Administration Cabinet received one (1) written comment with respect to the proposed amendment to this administrative regulation. The comment was submitted by Mr. Sommer and was adopted as part of his oral remarks.

- (1) Subject Matter: The application of route miles as provided for in KRS 136.1801 to 136.1806 to apportion value to Kentucky violates the United States Constitution's Commerce Clause. U.S. Const., art. I, § 8, cl. 3. The proposed amendments to the regulation address this issue and the commentator therefore supports the proposed amendment.

(a) Commentator: Mark Sommer

Comment: Mr. Sommer is an attorney representing a coalition of business operating commercial watercraft on the Commonwealth's waterways. The individual taxpayers file the return required for the assessment of *ad valorem* tangible property tax pursuant to KRS 136.1801 to 136.1806. In his oral presentation and written statement, Mr. Sommer stated that the use of route miles as provided for in the current statutes facially discriminates against out-of-state watercraft owners and was, in fact, purposely structured to achieve that goal. He stated further that the watercraft tax based on route miles was not fairly related to the services these taxpayers receive from the Commonwealth. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). As such, Mr. Sommer stated that his clients are in support of the proposed amendment to the regulation.

(b) Commonwealth Response: Mr. Sommer raises valid considerations regarding the application of the watercraft tax statutes. The Cabinet faces hazards of litigation in any challenge to an assessment based on the application of route miles to determine a taxpayer's watercraft assessment. See KRS 131.030(3). The Cabinet disagrees with his position that the current tax methodology is facially discriminatory. It is the Cabinet's position that the application of route miles to some taxpayers may potentially violate the Commerce Clause, depending on the facts and circumstances of each individual taxpayer. However, Mr. Sommer and his clients support the proposed amended regulation and no further action from the Department is required to address Mr. Sommer's comments.

(2) Subject Matter: The Department of Revenue is authorized to promulgate the regulation and is required to do so.

(a) Commentator: Mark Sommer

Comment: Mr. Sommer stated that the Department must administer the tax laws to comply with the requirements of the United States Constitution, and that this is a requirement and not discretionary. It is his position that the proposed amended regulation satisfies these requirements.

(b) Commonwealth Response: The Department agrees with this comment as it applies to this proposed regulation. KRS 131.130(1) specifically empowers the Department to promulgate regulations where necessary to administer and enforce the tax laws. This proposed amendment is required to provide taxpayers with a property tax assessment which complies with the federal law – the Commerce Clause. See KRS 13A.120(1).

V. SUMMARY OF ACTION TAKEN BY PROMULGATING AGENCY

The Finance and Administration Cabinet has reviewed the comments and recognize that Mr. Sommer and his clients support the proposed amended regulation. Therefore, the Finance and Administration Cabinet will not be amending the administrative regulation.